

1 Division?

2 A. Correct.

3 Q. Who, in general terms, are the employees and what is  
4 their function?

5 A. We have employees that work in the voter  
6 registration section, the voter absentee section,  
7 ballot return section and the administrative arm of  
8 it as well.

9 Q. It is fair so say these are civil servants from  
10 throughout the Election Division?

11 A. Yes.

12 Q. When there are district by district returns, a  
13 member of that return board initials that, correct?

14 A. Correct.

15 Q. And that happens with respect to every election  
16 district from the county?

17 A. Correct.

18 Q. After that happens, those initial district by  
19 district returns are compiled into the preliminary  
20 results that are in the exhibit you were discussing  
21 with Mr. Hicks; is that correct?

22 A. Yes.

23 Q. So is it fair to say that it's a two-step process?  
24 First district by district initial returns by  
25 members of the Election Board, then an announcement

1 and compilation into these results?

2 A. Right.

3 Q. And it is mandatory under the statute that those  
4 results be signed by the members of the Board of  
5 Elections, correct?

6 MR. HICKS: Objection. Calls for a legal  
7 conclusion.

8 THE COURT: Overruled.

9 BY MR. LIEB:

10 A. Yes.

11 MR. LIEB: If I may have one second to  
12 confer with Co-Counsel.

13 Nothing further, Your Honor.

14 MR. OPSITNICK: I have no questions.  
15 Nothing further, Judge.

16 THE COURT: Thank you very much, Mr.  
17 Wolosik. You may stand down.

18 MR. HICKS: Your Honor, at this time, the  
19 only other evidence that we would offer are the  
20 exhibits that are set forth in the stipulation,  
21 and we would move them into evidence at this  
22 time.

23 There is Exhibit 1A, which are the total  
24 of 195 petitions that were double-sided copies  
25 so I tried to keep the size down.

1 Exhibit 1B is the affidavit of Mr.  
2 Halderman that were attached together in some  
3 fashion to those 195 petitions.

4 Exhibit 2 are the copies of the Allegheny  
5 County website page, which pertains to the 2016  
6 general election results, and then a full  
7 page or a full three page of the summary report  
8 and the first pages of the detailed district  
9 report and the detail canvass report.

10 Then Exhibit 3, is the notice that was  
11 sent out about the Election's Division  
12 decision to recanvass the machine in the 52  
13 election districts that were subject of Exhibit  
14 1A, as well as the notice that was sent on  
15 November 29th to the candidates and political  
16 parties on each chair giving them notice of  
17 that December 5th 2016 canvassing.

18 We would move those into evidence, and we  
19 have already premarked those Exhibits 1A, 1B  
20 and 2 and 3.

21 THE COURT: They are part of the  
22 stipulation and there is no objection to them?

23 MR. OPSITNICK: Correct.

24 THE COURT: With that, you rest, Mr.  
25 Hicks?

1 MR. HICKS: With that, we would rest.

2 THE COURT: Mr. Lieb? Mr. Gaul? Do you  
3 wish to offer any evidence?

4 MR. LIEB: Your Honor, we had offered with  
5 our petition -- and we didn't have a chance to  
6 confer with it about opposing counsel, we had  
7 offered along with our petition an affidavit of  
8 Duncan Buhl, who was a computer scientist and  
9 expert in the use and operation of electronic  
10 voting systems.

11 We would wish to offer that affidavit into  
12 evidence at this time. As I said, we didn't  
13 have a chance to confer with opposing counsel in  
14 our stipulation this morning.

15 We would move to offer it into evidence

16 THE COURT: Well, I have a question. I  
17 have actually looked at it, because you made it  
18 part of your petition. So while you were out  
19 here making your stipulation, I read it.

20 So first off, is there any objection to  
21 this affidavit?

22 MR. HICKS: Yes, Your Honor.

23 THE COURT: I can see by the look on your  
24 face, Mr. Hicks, you almost came out of your  
25 shoes on that one.



1 MR. HICKS: We have stipulated as to Mr.  
2 Halderman's affidavit, not to the truth of the  
3 matter, just because that was one of the  
4 documents that was submitted. This affidavit is  
5 being offered clearly is hearsay. The witness  
6 is not here and I don't see any more relevance  
7 to the issue in this proceeding.

8 MR. OPSITNICK: Judge, just a high tech  
9 look, if you recall, a fellow, Mr. Nowelt, a  
10 fellow from New Jersey said you can fix or hack  
11 the lever machines with a ballot.

12 I don't believe that affidavit is  
13 relevant to what we are doing here. It's either  
14 we are going to recanvass Monday or we're not.

15 THE COURT: One of the things that  
16 they have asked for, which you haven't agreed to  
17 by way of stipulation, is to run some type of  
18 forensic tests on the machines again.

19 MR. OPSITNICK: We submit that was done  
20 twice. Can I recall Mr. Wolosik and have him --

21 THE COURT: I think we can agree to it. I  
22 read about it in the newspapers and they are  
23 trying to reassure everybody on what they do.

24 MR. OPSITNICK: If I could briefly just  
25 have Mark testify as to what happened of the

1 forensic analysis both before and after the  
2 election.

3 THE COURT: There's no evidence, because  
4 you haven't produce any evidence, that there was  
5 any evidence of tampering or any type of hacking  
6 on these machines, which are not connected to  
7 the internet.

8 I have read Mr. Buhl's affidavit, but you  
9 don't even allege this in your pleading that you  
10 have some reason to believe that what happened  
11 was some mathematical quirk or anything else  
12 that would lead one to believe that the  
13 integrity of the electronic machines as being  
14 challenged.

15 So, now this affidavit comes out of the  
16 blue and is not supported by anything else. You  
17 aren't making that claim in your plea.

18 MR. LIEB: Your Honor, we understand the  
19 purposes of these proceedings would not be to  
20 sort of litigate the underlying question of were  
21 the returns accurate or not. That's the purpose  
22 of the recanvass.

23 THE COURT: Well, not if Mr. Buhl's  
24 affidavit become magically irrelevant if that's  
25 not the purpose of this proceeding.

1 MR. LIEB: I think we were offering the  
2 affidavit to support our argument that under  
3 section 2650, which entitles a candidate to  
4 examine machines that were used as part of a  
5 recanvass that takes place, to explain to the  
6 Court what it would mean to examine the  
7 machines.

8 THE COURT: Well, let's hear what Mr.  
9 Wolosik has already done to these machines, both  
10 prior to the election and after the election.

11 THE WITNESS: About two months prior to  
12 the election -- and we have done this prior to  
13 the November 2008 election -- we engage a  
14 company by the name of GRB Consulting.

15 We give notice that's required under the  
16 Election Code to political parties and bodies  
17 and/or groups, organizations that register with  
18 the Elections Divisions at least 50 days prior  
19 to a primary election.

20 We permit any of those participates to  
21 select up to 20 voting machines at random or  
22 however they would like to do it. We pull the  
23 firmware chip that is on each voting machine.  
24 It's a computer chip and that is actually the  
25 machine instructions and that is compared --



1 we're getting a little bit over what I do for a  
2 living here. It's hash code and it compares the  
3 firmware instructions that were certified  
4 federally and by the Department of State to  
5 firmware instructions that are resonant on each  
6 machine.

7 We have done that prior to the November  
8 2008 election, and have never seen an instance  
9 where any of firmware that is on the random  
10 selected machines differs from the firmware that  
11 was certified by these various --

12 THE COURT: Did you do that before the  
13 primary and general?

14 THE WITNESS: Yes, we do. On election  
15 day, we engage a certified public accounting  
16 firm. In the past, it's been ParenteBeard.  
17 Now, it's Baker-Tilly.

18 Prior to the election, they randomly  
19 select a precinct. They select voting machines,  
20 and on election day, they vote these machines to  
21 a script and verify that the machines record the  
22 votes correctly as entered on the devices from  
23 the script that is videotaped, and I think we  
24 have done that since the November 2006 election.

25 There has never been an instance where



1 there was any deviation from the script that was  
2 voted on election day. The results have  
3 matched.

4 THE COURT: Those are from the machines  
5 from the precincts that are randomly picked?

6 THE WITNESS: Yes. I think at least the  
7 last two what we call parallel testing on  
8 election day, we have given notice of that  
9 parallel testing to the same groups or  
10 organizations that we give notice of the  
11 firmware verification.

12 Finally, we engage a company to verify  
13 that our election tabulation network that's  
14 housed at the warehouse in the North Side is not  
15 connected to the internet.

16 That is done, I think, two or three days  
17 prior to the election and the day or two after  
18 election day.

19 So those are the three types of testings  
20 that we have done.

21 THE COURT: If this Court permits the  
22 canvass to go forward, what would you do so far  
23 as any forensic testing of any other machine?  
24 Is there a protocol for that?

25 THE WITNESS: What we would do is use the

1 same protocol that's been approved by the  
2 Department of State for the two statewide  
3 recount/re canvass that occurred.

4 It was a primary and an election where the  
5 statewide results were a half a percent or less,  
6 which triggers an automatic recount.

7 The procedure that we followed was we get  
8 the results that were gathered on each voting  
9 machine has its own flash memory card, and it  
10 records the votes cast separately on that  
11 machine.

12 We read those into a tabulation database  
13 and compare those results to the results that  
14 were generated on election night at each polling  
15 place that were signed.

16 THE COURT: That's an internal flash, and  
17 that is different than what is registered by the  
18 machine itself? You took a count from another  
19 source?

20 THE WITNESS: Yes, that's correct.

21 THE COURT: And this flash drive is what?  
22 A memory card?

23 THE WITNESS: It's a memory card. It's a  
24 removable memory card. Then we compare those  
25 results to the results that were generated on

1 election night.

2 THE COURT: How many machines did you do  
3 that with?

4 THE WITNESS: That would have been done  
5 for all the machines that were used in those  
6 requested districts.

7 THE COURT: Okay. Any questions for Mr.  
8 Wołosik?

9 MR. OPSITNICK: One question for him.

10 REDIRECT EXAMINATION

11 BY MR. OPSITNICK:

12 Q. Mark, you mentioned the pre-election and the  
13 election day procedures.

14 Is there anything post election where an  
15 analysis was done?

16 A. Well, the statute requires that an audit be done of  
17 two percent of the votes cast or 2,000 votes,  
18 whichever is lesser.

19 What we do is we use the same protocol  
20 that we used in the recount procedure for two close  
21 elections where we get the vote totals from the  
22 members of card blanche totals. Tabulate them and  
23 them compare them to the results that were posted  
24 and gathered on election night, and also hand count  
25 any paper ballots that were cast, because those were



1 ultimately tabulated electronically as well.

2 THE COURT: Anything else?

3 MR. LIEB: May I very briefly inquire.

4 RECROSS EXAMINATION

5 BY MR. LIEB:

6 Q. The procedure that you referred to prior to the  
7 primary and general election when you examined the  
8 firmware, can you approximate how far in advance  
9 prior to the election that takes place?

10 A. 60 days.

11 Q. Approximately, how many voting machines is that  
12 process conducted on?

13 A. 20.

14 Q. Approximately how many voting machines are used in  
15 Allegheny County in any given election?

16 A. Anywhere from 4,200 to 4,500.

17 Q. The process of examining the firmware is something  
18 that the Elections Division does of its own accord?  
19 It's not required?

20 A. That's right. I think we are the only jurisdiction  
21 in the country that does that.

22 Q. The reason you do, I presume, is because you think  
23 it's important to ensure that the firmware running  
24 the machines on election day is, in fact, the same  
25 as it was initially manufactured and verified and

1 not compromised in any way, correct?

2 A. That's right.

3 Q. About how long does the process of examining  
4 firmware in this manner take?

5 A. Two hours.

6 Q. Approximately, how much does it cost?

7 A. \$6,500 each time it's done.

8 Q. All tolled for the 20 odd machines?

9 A. Yes.

10 Q. So this is something that your Election Division  
11 does as a matter of course to examine the voting  
12 machines and make sure they are actually tabulating  
13 votes, correct?

14 A. Correct.

15 Q. Not particularly difficult to avert, is it?

16 A. No.

17 MR. LIEB: Nothing further. Thank you.

18 MR. HICKS: Just a couple of questions.

19 RECROSS EXAMINATION

20 BY MR. HICKS:

21 Q. Do we know many machines are potentially impacted by  
22 this requested recount for the recanvass that is  
23 scheduled for Monday?

24 A. I do not.

25 Q. So as you sit here today, you don't know how many

1 actual machines are going to be impacted?

2 A. I do not.

3 Q. You said it was \$6,500 for 20 machines to do a  
4 software analysis?

5 A. Yes.

6 Q. Would it be accurate to say that we are at least  
7 dealing with a minimum of 52 machines on Monday if  
8 you were to do this software analysis?

9 A. Yes.

10 Q. Do many of these districts have more than one  
11 machine?

12 A. Yes.

13 Q. So it's possible that we would be dealing with 104  
14 or ever greater?

15 A. Probably more.

16 Q. In your estimation, based on the 52 election  
17 districts that you saw, would it be accurate to say  
18 that there are at least two to three voting machines  
19 per district?

20 A. Yes.

21 Q. So we are potentially dealing with 150 machines?

22 A. That's right.

23 Q. At a cost of \$6,500 for just 20, correct?

24 A. Correct.

25 Q. We would have to multiple that out and figure out



1 the total cost to the county to be able to do that,  
2 correct?

3 A. Correct.

4 Q. As part of your budget, have you budgeted to do  
5 those types of analysis at a cost of potentially  
6 thousands and thousands and thousands of dollars?

7 A. We have not.

8 Q. Had the districts that filed their petitions on  
9 November 28th posted any cash deposit to pay for any  
10 of this type of firmware analysis?

11 A. They have not.

12 MR. HICKS: That's all.

13 MR. OPSITNICK: Judge, I have one  
14 follow-up.

15 REDIRECT EXAMINATION

16 BY MR. OPSITNICK:

17 Q. Mark, the recanvass is scheduled on Monday morning.  
18 Is that recanvass intended to include any type of  
19 forensic analysis?

20 A. It is not.

21 Q. So the cost that Mr. Hicks inquired about would not  
22 be incurred come Monday, correct?

23 A. That is correct.

24 Q. Rough length of time to recanvass machines in 52  
25 districts, how long do you think that will take?

1 A. Two hours.

2 Q. Scheduled to start at 10:00, correct?

3 A. Correct.

4 Q. So by no later than this time on Monday, they would  
5 complete everything?

6 A. I would think so.

7 RECROSS EXAMINATION

8 BY MR. HICKS:

9 Q. Mr. Wolosik, but for the petition or the documents  
10 that were filed on November 28th, would the board  
11 have certified results on November 28th?

12 A. Yes.

13 THE COURT: Thank you very much, Mr.  
14 Wolosik.

15 I have to make a ruling of what I was  
16 doing was discussing the admissibility of Mr.  
17 Buhl's sort of contact there that the whole  
18 purpose of the exercise was to determine whether  
19 or not the affidavit is admissible, and I find  
20 that, one, it is hearsay, and it is not  
21 admissible for that purpose, and, also, at this  
22 time, it is really not relevant and is not part  
23 of the record.

24 That was your offer of evidence, I  
25 believe. That was the exhibit that you filed.

1 Anything else that you wish to offer, as  
2 far as evidence, Mr. Lieb?

3 MR. LIEB: No, Your Honor.

4 MR. OPSITNICK: I have nothing further,  
5 Judge.

6 THE COURT: Mr. Hicks, you are finished  
7 with your evidence?

8 MR. HICKS: My associate here, Mr. Bell,  
9 reminded me that I didn't formally enter the  
10 stipulations of facts into the record. So I  
11 would offer them into the record. I thought I  
12 had done that.

13 THE COURT: You read them into the record.

14 MR. HICKS: There were some that I didn't  
15 read as well, but to the extent that I didn't  
16 read them, I wanted to make sure certainly those  
17 are.

18 THE COURT: All right. With that you  
19 rest.

20 All right. You may argue.

21 MR. HICKS: Your Honor, the Election Code  
22 -- the particular section that we are dealing  
23 with here is under 1404, and the particular  
24 section 1404(e), which deals with provisions for  
25 recount or recanvass.



1 THE COURT: Have you attached that?

2 MR. HICKS: It's actually attached in the  
3 appeal.

4 THE COURT: Let me get to that before you  
5 start reading.

6 MR. HICKS: It's paragraph 13. For the  
7 record, it's 25PS section 3154E. We've copied  
8 it in particular the first paragraph, but the  
9 remaining paragraphs are only to deal with  
10 actual recount or recanvass procedure.

11 Our argument here is two-fold. One the  
12 statute has been misconstrued as to what the  
13 Supreme Court has said about the election  
14 results with regard to recount and recanvass and  
15 who is entitled to do them, as well as how they  
16 are being conducted.

17 When you take a look 1404(e) you see that  
18 there are two requirements that have to be done.  
19 One, there has to be a petition of three voters  
20 of any district verified by affidavit. But,  
21 more importantly, is really the timing that is  
22 at issue in this particular case.

23 It says right there in the middle that if  
24 that petition is filed by the voter, the county  
25 board shall at any time prior to the completion

1 of the computation of all the returns of the  
2 county then summon back the return of the board  
3 and give notice to the county parties and  
4 candidates and conduct a recount or recanvass.

5 But the operative words are upon at any  
6 time prior the completion of the computation of  
7 all the returns for the county.

8 Mr. Wolosik testified that that act of  
9 completing the computation of all the returns  
10 from the county was was November 23, 2016.

11 At that point, the board no longer has any  
12 power to come back as a return board. Their job  
13 as a return board was finished.

14 At that point, if there was any recount or  
15 recanvass that would have to be filed, then a  
16 voter or anyone else who is interested would  
17 then fall under the section of the Election Code  
18 that deals with recounts or recanvass, which is  
19 under section 1701 through 1703, which are the  
20 recount and recanvass of either opening up the  
21 ballot boxes in the district to count the paper  
22 ballots and the provisional ballots, or under  
23 Section 1702, which is actually the re  
24 canvassing of the voting machine.

25 Those provision require that those types

1 of petitions get filed in the court where the  
2 Court fees are paid, cash deposits, whether it  
3 be a \$50 per box or per voting machine gets paid  
4 or \$100 per machine or voting box get filed.

5 So that the cost for that type of recount,  
6 regardless of how long it may take, there is  
7 still time and effort being incurred by the  
8 county to do those types of things.

9 The Election Code sets forth those  
10 procedures. Now, these voters could have  
11 participated during the actual re canvassing  
12 portion that took place three days after the  
13 election and went up all the way to November 23,  
14 2016. They chose not to do that.

15 So, at this point, the Election Code is  
16 clear that once the board is done with its  
17 computation, any effort to try to recount or  
18 recanvass has to go under section 1701 to 1703,  
19 which requires a petition to be filed in this  
20 Court and the deposits to be filed.

21 According to Dr. Stein and her campaign,  
22 they are relying on sections 1404(a) and section  
23 1404(f) of the Elections Code, which refers to  
24 the signing and announcement, but I would argue  
25 that the computation and canvassing is separate



1 and apart from whatever the board is required to  
2 do.

3 When the legislature tied it to just the  
4 completion of the computation and the  
5 canvassing, it meant something.

6 I have been doing this now for at least  
7 15, 20 years, and we have always look for when  
8 does the return board complete its computation,  
9 because we know we have five days to then file  
10 any other types of recanvass.

11 If they were really concerned about what  
12 is going on in particular election, then their  
13 candidates and those parties are watching the  
14 entire recanvass process and we file a petition  
15 with the board at that time so they can be  
16 addressed at the board level before that  
17 computation is completed.

18 Once the board finishes it duties, it does  
19 not have the power to bring itself back into  
20 existence to continue to incur recounts or re  
21 canvassing without a valid recount petition  
22 being filed or an order of this Court being  
23 issued authorizing. That's what is missing in  
24 this particular case here.

25 The other thing I wanted to emphasize, and

1 it's not in the appeal, but I think it's because  
2 I guess it's something that should not go  
3 unnoticed is the fact that we are dealing with a  
4 federal election, and we're dealing with the  
5 presidential election and the senatorial  
6 election, which of coincidentally, each  
7 particular appeal, that is the only thing  
8 they're focused on.

9 And because we're dealing with the federal  
10 election, we also have particular concerns there  
11 with regard to both people protection, as well  
12 as the Safe Harbor Law that you place under  
13 3USC5, which requires that the county and the  
14 Commonwealth report the results within a certain  
15 periods of time so that the electors for  
16 president can go to the electoral college on  
17 December 19th.

18 So I appreciate that -- what I am trying  
19 to stress is that if Allegheny County and the  
20 Stein Campaign feels that Allegheny County  
21 should reconvene as the return board, even  
22 though it has already completed its computation  
23 post the five day period, then Allegheny County  
24 will be the only county that will be doing that  
25 and create a protection problems with respect to

1 this federal election.

2 THE COURT: Well, if they file with the  
3 Court, as you said, and it posts Monday, it will  
4 still be delayed, you know. We would still be  
5 running up against the electoral college  
6 deadline of December whatever it is.

7 MR. HICKS: We might be.

8 THE COURT: If they had followed of what  
9 you described as proper procedure, we still have  
10 a delay in the certification of the election,  
11 correct?

12 MR. HICKS: That is correct. Then the  
13 only thing I want to stress --

14 THE COURT: You did not put that in your  
15 plead, and it's probably for good reason. It's  
16 not a winner, Mr. Hicks.

17 MR. HICKS: I just needed to note that. I  
18 am certain that the Court recognizes the  
19 particular differences of this election versus  
20 the other one, but I think from the statutory  
21 ground, they missed the period of time.

22 They filed it in wrong place. They didn't  
23 post the bond.

24 THE COURT: And you believe that the  
25 Election Board doesn't have jurisdiction to do



1 this again?

2 MR. HICKS: They don't have the authority,  
3 correct. I cited in our appeal cases that go  
4 back the 1900's.

5 THE COURT: The deadline to file was when?

6 MR. HICKS: November 23rd, before they  
7 announced it at 10:30 a.m.

8 THE COURT: And when were they filed?

9 MR HICKS: November 28, 2016 starting  
10 sometime in the morning and continuing  
11 throughout the five days.

12 THE COURT: So it was five days after  
13 that?

14 MR. HICKS: Correct.

15 THE COURT: Had they filed, under your  
16 theory, with the Court of Common Pleas and  
17 followed that section of the Election Code, the  
18 recanvass would have been valid and taken place  
19 on Monday morning?

20 MR. HICKS: If they met all the  
21 requirements of the Election Code, then, yes.

22 THE COURT: We still would be recounting  
23 on Monday morning.

24 MR. HICKS: We might have.

25 THE COURT: Well, had they met all the



1 requirements. Who would like to go next?

2 MR. OPSITNICK: Counsel from out of town  
3 deferred to me for some reason.

4 Judge, a little bit of context can be made  
5 from this. The Board of Elections was set to  
6 meet 10:00 Monday morning to finally certify.  
7 None of us at county law Elections Division is  
8 aware that this petition filing and affidavit  
9 was going to occur until Monday morning when the  
10 doors open at 8:30 and the petitions come in.

11 A meeting that convened with Mr.  
12 Teskevich, who was there to observe, Mark and  
13 myself, I opine whether it's right or wrong,  
14 that given the circumstances, let those  
15 petitions come in at the Board of Elections or  
16 Election Division. Let's advise the Board of  
17 Elections to not certify anything pending a  
18 shake down, and as a result that happens, as a  
19 result the Board of Elections would meet on  
20 Monday the 12th to certify and as long as those  
21 results get to Harrisburg that day, because the  
22 13th is the first of two key dates that Mr.  
23 Hicks mentioned, because the state has to  
24 certify or report who these electors will be,  
25 and would need get it to the electoral college

1 on the 19th.

2 So perhaps in retrospect, I probably  
3 misadvised my client. I am not happy with that,  
4 but that's probably what happened.

5 With that being said, Judge, I am going to  
6 try to work my way out of this a little bit  
7 because I am somewhat embarrassed.

8 It was timely filed. The substance of  
9 these three affidavit filings for these 52  
10 districts were timely filed. The right  
11 allegations were made, and as the Court pointed  
12 out, simply not in the right place with the  
13 filing requirement and the bond requirement.

14 I think the Court has the power under  
15 Section 3157(b) that says the Court shall have  
16 full power and authority to hear and determine  
17 all matters pertaining to fraud and make such  
18 decree as right as justice may require. I  
19 think, Judge, you have some equitable --

20 THE COURT: Well, that's quite a bit of  
21 power.

22 MR. OPSITNICK: On election night, for the  
23 second presidential election in a row, Mr. Hicks  
24 went and obtained an order from the elections  
25 judge, Judge O'Toole, this time to extend the

1 deadline to file emergency absentee ballots that  
2 under the statute have to be in the Elections  
3 Division by 8:00 until 9:00, and to the extent  
4 the time to challenge those absentee ballots to  
5 Thursday afternoon.

6 So if there are provisions of the Election  
7 Code that can and have been waived and were  
8 waived as recently as November 8th, which was a  
9 federal election.

10 I submit to the Court that you permit this  
11 recanvass to go on so that nobody will consider  
12 appeal. Nobody will gum up the work.

13 What the Election Division is going to do will  
14 be conclude between 10:00 and midday on Monday  
15 so the Board of Elections can meet formally and  
16 finally certify on the following Monday, the  
17 12th, and we'll proceed from there. Thank you.

18 THE COURT: Mr. Lieb?

19 MR. LIEB: So I actually think that Mr.  
20 Opsitnick gave his client entirely the correct  
21 advice, and the reason he gave his client  
22 correct advice is because they are still sitting  
23 as the Election Board.

24 As Mr. Hicks pointed out in his  
25 presentation, there are a whole host of



1 technical requirements here that contributed to  
2 this, and he is aware of the technical  
3 requirements.

4 I don't know if Your Honor has the notice  
5 of appeal before, but if you look at Paragraph 6  
6 and you look at the presentation the appellants  
7 are making as to why the voter's petitions were  
8 untimely, what the appellants is saying is that  
9 the returns from each election district were  
10 read and found to be correct and then were added  
11 together and they were tabulated and they were  
12 unofficially resolved at 10:32.

13 It's their position that once the document  
14 that's in Exhibit 2 came out at 10:32, that was  
15 the deadline. That is their position. That is  
16 what was alleged in Paragraph 6 of the notice of  
17 appeal.

18 Your Honor, that language directs section  
19 3154 (f). I don't know if Your Honor has 3154  
20 (f) before you.

21 THE COURT: I don't, but you can read it  
22 to me.

23 Mr. LIEB: So it says: As per the returns  
24 from each election district are read, computed  
25 and found to be correct or corrected as



1           aforesaid, they shall be recorded on the  
2           lengths. They shall be added together,  
3           announced and attested by the clerk who may have  
4           computed the entry and signed by the members of  
5           the county board.

6           That's the one thing that Mr. Hicks left  
7           out of Paragraph 6 because it didn't happen. We  
8           heard the testimony, Your Honor, that for  
9           whatever reason is the practice of the Allegheny  
10          County Board of Elections to have that signature  
11          occur at the same meeting where final results  
12          are certified.

13          They certify the preliminary and then they  
14          certify the final results of the election in  
15          succession, but until that signature happens,  
16          the return board is still duty computation.

17          These are official results which, as Mr.  
18          Hicks would claim, triggers the deadline are  
19          nullity, and the reason they are nullity is  
20          because of the legally required action that the  
21          county board of elections itself acknowledges it  
22          is required to take.

23          The three signatures of the members of the  
24          county board of elections hasn't happened yet.  
25          Until that happens, we are still -- the board is

1 sit sitting as the return board. The unofficial  
2 results do not exist as a legal matter, and the  
3 petitions are still timely.

4 I can walk into the Board of Elections and  
5 file petitions right now and they would still be  
6 timely, because the requirements that are  
7 necessary to shift from being a return board and  
8 actually coming up with the unofficial results  
9 aren't there.

10 I think, frankly, it's sort of telling  
11 that that little thing was omitted from  
12 Paragraph 6 of the appeal because I think the  
13 appellant knows that all technical requirements  
14 have to be satisfied. That's why we are  
15 claiming at 10:32 when the exhibit is generated  
16 and the deadline occurred, not when the  
17 individual district results come in and the  
18 members of the Election Board initialed them.

19 It's a two-step process and until step two  
20 step is complete, the return board is still the  
21 return board. There are no returns and they  
22 were timely.

23 I think that's the easiest way to resolve  
24 this issue. I think that means they don't have  
25 to get into the whole question of what the

1 deadline is under 3154(f) in reference to any  
2 admission or recount under 3154(f) precludes the  
3 Board of Elections from receiving these  
4 petitions.

5 I think there's, to me, no question. Just  
6 read 3154 (f). The requirements that are  
7 necessary haven't been complied with, and we all  
8 agree that the requirements need to be complied  
9 with which is why they have members of the  
10 county election board to see the final return.

11 So the petitions are timely because the  
12 return board is still the return board.

13 THE COURT: Thank you.

14 MR. HICKS: Your Honor, if I could reply.  
15 First of all, as to Mr. Opsitnick's argument,  
16 this Court doesn't have the power to extend the  
17 deadlines or direct the recount or the  
18 recanvass.

19 There are numerous cases from the Supreme  
20 Court and Commonwealth Court which says that  
21 this Court does not have the equitable power  
22 when a person doesn't comply with the Election  
23 Code with regard to the place where the recount  
24 petition is to be filed.

25 This isn't the first time somebody has



1 filed a recount petition in the Election  
2 Division when it's supposed to be filed in the  
3 Court.

4 This isn't the first time that there  
5 wasn't paid a cash deposit or surety bond, all  
6 of which are fatal defects for a recount  
7 petition that has not been properly filed. So I  
8 disagree that the Court has equitable power to  
9 do that.

10 As to the instance that Mr. Opsitnick  
11 mentioned on election day, first off, I didn't  
12 agree --

13 THE COURT: You don't have to speak to it.  
14 It's irrelevant. Judge O'Toole is sitting as  
15 the Judge of Elections. I met with him that  
16 day.

17 In fact, as you know, I have was here  
18 until around 6:00 that night. So a long day for  
19 all of us.

20 That's Judge O'Toole's ruling. I have no  
21 idea the underlying -- nor do I care what the  
22 underlying reason was that Judge O'Toole  
23 extended that period of time. Whatever the  
24 facts that were presented, I am sure the  
25 Administrative Judge or Orphan's Court of



1 Allegheny County made a fair and equitable  
2 decision. He always does.

3 MR. HICKS: I just want to put on the  
4 record that I actually opposed that.

5 The argument raised by Mr. Lieb actually  
6 highlights the issue of these court actions. If  
7 you agree with Mr. Lieb, under his scenario,  
8 then because the election results have not been  
9 signed and Mr. Opsitnick has now said they are  
10 not going to be signed until December 12th, that  
11 means throughout this entire period of time,  
12 more recount and more recanvass petitions can be  
13 filed, and that afterwards and, more  
14 importantly, the five day period under section  
15 701 through 703 can now being extended until  
16 after or up to basically the day before.

17 Because if the certification occurred, as  
18 Mr. Opsitnick proposed December 12th, that gives  
19 another five days, which means that the recount  
20 and recanvass can be filed up to two days before  
21 the electors are supposed to be at the electoral  
22 college.

23 To me, that signifies the problem with  
24 this whole approach. This county has always  
25 gone by the computation when that computation is

1 completed.

2 THE COURT: Why is it unofficial though?  
3 If it says unofficial and it isn't signed, then  
4 what is it then?

5 MR. HICKS: That is the terminology  
6 provided under the code. It becomes official  
7 only to see if there are any recount or  
8 recanvass petitions filed with the Court, at  
9 which point, then the Court takes over and  
10 reviews it and determines whether or not there  
11 are any issues such as should there be a  
12 forensic examination, should the return board be  
13 reconvened.

14 We're dealing with, you know, there were  
15 basically two ways to do the recount. One prior  
16 to November 23rd of the Election Board and one  
17 is with this Court.

18 Basically, they want to not impose or  
19 involve this Court until now sometime around  
20 December 12th, which is just unworkable.

21 THE COURT: Anything else?

22 MR. LIEB: May I be heard, Your Honor?

23 THE COURT: One last time. We keep  
24 going back and forth and back and forth. It has  
25 to end somehow.

1 MR. LIEB: He has no argument as to why  
2 the reading of the statute that we offered, Your  
3 Honor, is in any way incorrect. The remedy for  
4 the problem we are talking about is to move  
5 forward the certification date.

6 It's not to read the requirements out of  
7 the statute that in order for the return board  
8 to stop sitting as the return board, the three  
9 members of the county board of elections need to  
10 sign.

11 It didn't happen. It continued to not  
12 happen. We concede it has to happen. He said  
13 that it is going to, you know, cause some  
14 constitutional problem if the county board of  
15 elections held the certification meeting too  
16 close to December 14th.

17 A, this is not the proper forum to take up  
18 that challenge. That, if anything, that should  
19 be appealed from a notice saying when they are  
20 going to hold a certification meeting.

21 B, surrender or deal with that, not  
22 preventing these voters from getting the recount  
23 that they timely filed.

24 THE COURT: The recount is scheduled for  
25 10:00 Monday morning?

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MR. OPSITNICK: Yes, sir.

THE COURT: Anything else? I think we're done here. I will enter an order probably within the next the half hour. I will draw it up. Thank you.

This Court stand in recess.

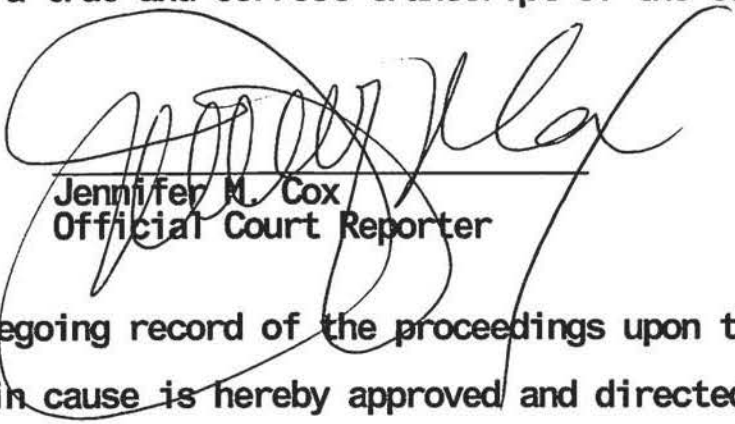
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(Whereupon, this matter adjourned.)



C E R T I F I C A T E

I hereby certify that the proceedings are contained fully and accurately in the notes taken by me on the hearing of the herein cause and that this is a true and correct transcript of the same.

  
Jennifer M. Cox  
Official Court Reporter

The foregoing record of the proceedings upon the hearing of the herein cause is hereby approved and directed to be filed.

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